CHING SUIT FEE

v.

MALAYAN BANKING BHD

HIGH COURT MALAYA, KUALA LUMPUR
JAMES FOONG J
[CIVIL SUIT NO: S1-22-548-93]
18 MAY 2004

BANKING: *Banker and customer - Right of recourse - Letter of credit - Whether defendant a negotiating bank or confirming bank - Whether defendant had right of recourse against plaintiff - Whether defendant entitled to recover sum in question from plaintiff - Whether defendant mistakenly credited sum into firm's account - Whether unfair for plaintiff to retain sum - Whether plaintiff unjustly enriched as a result of transaction*

The plaintiff was the sole proprietor of a firm which had secured a buyer for its goods. The buyer, from Taipei, was known as Mcmillan Enterprise Co Ltd ('Mcmillan'), and the transaction was by way of letter of credit ('LC') issued by one Taipei Business Bank ('the issuing bank') involving a sum of approximately RM194,800. Having received the LC, the firm approached the defendant for assistance since this was the first time that it had experienced payment by an outward LC *ie*, overseas LC. The firm executed a number of documents and handed them over to the defendant together with invoices, freight bills, packing lists and the original LC. The defendant forwarded these documents to the issuing bank and made a claim for the amount mentioned in the LC to one Hong Kong & Shanghai Bank in Kuala Lumpur ('the reimbursing bank'), the agent of the issuing bank. The reimbursing bank, upon confirmation from the issuing bank, made the payment which the defendant subsequently credited into the firm's account with the defendant. The issuing bank, however, informed the defendant that there were discrepancies in the documents forwarded by the defendant which did not conform to the requirements set out in the LC and that it wanted the money returned. The defendant, despite initial protestations, acceded to the issuing bank's request and refunded the money together with interest. It subsequently demanded from the firm the amount refunded and then arbitrarily debited RM196,528 from the firm's current account.

The plaintiff thus sought a declaration that the defendant had unlawfully debited RM196,528 from the firm's account and deprived the plaintiff from utilising such a facility, and for the defendant to return the said sum. The issues requiring determination were: (i) whether the defendant was a negotiating bank

or confirming bank, and if it had the right of recourse against the plaintiff under the process undertaken in this transaction; (ii) whether the defendant was entitled to claim from the plaintiff under the deed of indemnity; (iii) whether the defendant was entitled to claim and recover from the plaintiff the said sum so credited to the firm's account as a holder in due course of bills of exchange; (iv) whether there was a mistake of fact in failing to scrutinise and discover the discrepancies resulting in the defendant mistakenly crediting the sum of RM194,605 into the firm's account, and if it was unfair and unreasonable for the plaintiff to retain such a sum; and (v) whether the plaintiff was unjustly enriched as a result of this entire transaction.

Held (for the plaintiff):

[1] Despite the use by the defendant of an incorrect form (the UCP 400 form should have been used instead of ICC Publication 322) and adoption of certain incorrect procedures in dealing with the respective issuing and reimbursing banks, the character of this transaction remained of a negotiating kind. The main reason was because the transaction was a LC transaction from the very beginning. The LC was the instrument agreed upon by the seller and buyer for payment, and none of the parties changed that. Besides, even though the wrong form was used, the word "LC" was specifically mentioned in the last section of the document. (p 229 b-c)

[1a] Although this may have been a negotiating transaction, this did not automatically render a right to the defendant for recourse. There was no evidence that stated that the moment the defendant acts as a negotiating bank, it was entitled to recourse against the plaintiff for discrepancies in the documentation. Hence, this defence was unsustainable. (p 229 f)

[2] On the facts, there were circumstances surrounding the deed of indemnity that cast serious doubts on the authenticity that was meant for this particular transaction. There was indemnity given, but it was for the earlier inward LC transaction, not for this outward LC undertaking, and that document was never intended for general application or to be extended to this current transaction. The general indemnity was not applicable for recourse against the plaintiff in this particular instance. (pp 229 h, 230 a-b, h)

[3] The drawee in one of these bills of exchange was incorrectly inserted as the seller – Mcmillan – instead of the issuing bank, and there was no evidence to prove the presentation of this bill of exchange by the defendant to Mcmillan. For the next bill of exchange, there was acceptance since there was payment made by the issuing bank (through

the reimbursing bank) to the defendant. Thus, the right of any holder in due course of such a bill naturally no longer possesses any rights thereunder since the bill itself had been satisfied. Furthermore, since there was no notice given by the defendant to the plaintiff for non-acceptance of the bill of exchange, the drawer is exempted from its obligation under the instrument by virtue of s. 48 of the Bills of Exchange Act 1949. (pp 231 e-h & 232 b-c)

[4] In a negotiating transaction, there is no duty for the negotiating bank to scrutinise the accompanying documents against the LC, and if the defendant took it upon himself to do so, it must then bear a certain amount of responsibility in not detecting the discrepancies. Thus, when the defendant carried out such an examination, the defence of mistake in failing to detect the discrepancies and making payment to the firm could not hold water, particularly when such payment was only credited to the firm after receipt of such funds from the reimbursement bank which in turn obtained prior approval from the issuing bank before making the payment. (pp 232 d-e & 233 a)

[5] The plaintiff had not only sold goods to Mcmillan but had also freighted them to Taiwan. There was no unjust enrichment by the plaintiff. If the buyer elected to refuse collection, it was not the fault of the firm or the plaintiff. The plaintiff gained nothing from this. (p 233 c)

[Plaintiff's claim for general and special damages not granted; costs to plaintiff but not on a solicitor and client basis.]

Legislation referred to:
Bills of Exchange Act 1949, ss. 42, 43, 48

Other source(s) referred to:
Halsbury's Laws of England, 4th edn reissue, vol 4(1), para 423

For the plaintiff - N Ravi (R Indra Gandhi); M/s Ravi & Assoc
For the defendant - Peter KL Chen (SP Tan); M/s Abd Aziz Chen & Co

Reported by Suresh Nathan

JUDGMENT

James Foong J:

Introduction

The actual issue in this case involves the question of recourse by a bank against its customer.

Background

The plaintiff is a sole proprietor of a firm known as Prima Index Enterprise (the Firm). Sometime in July 1993, the firm secured a buyer for its goods. The buyer was from Taipei, Taiwan, known as Mcmillan Enterprise Co Ltd (Mcmillan). The transaction was by way of Letter of Credit (LC) issued by a Taiwan bank: Taipei Business Bank (the issuing bank). The sum involved was approximately RM194,800.

Having received the LC, a representative of the firm (PW2) approached the defendant's branch office in Bukit Bintang, Kuala Lumpur to assist in this transaction. One Keshmahinder Singh of the defendant's Bills Department attended to him. According to PW2, this was the first time the firm experienced payment by outward LC (overseas LC) as compared to inward LC, which the firm had, on one previous occasion, requested the defendant to handle.

Acting on the advice of Keshmahinder Singh, the firm executed a number of documents and handed them to the defendant together with invoices, freight bills, packing list and the original LC.

The defendant forwarded these to the issuing bank and consequently, according to established trade practice, made a claim for the amount mentioned in the LC to a reimbursing bank, the Hong Kong & Shanghai Bank in Kuala Lumpur (the Reimbursing Bank), the agent of the issuing bank.

Upon such request, the Reimbursing Bank, on 15 July 1993, sought confirmation from the issuing bank to make such payment. The issuing bank duly approved this, and when the defendant received such payment it was immediately credited to the firm's account with the defendant on 22 July 1993.

Up to then all was well. But on 24 July 1993, the issuing bank informed the defendant that there are discrepancies in the documents forwarded by the defendant to them. These discrepancies are, to me, minor in nature but the issuing bank insisted that these did not conform to the requirements set out in the LC. The issuing bank wanted their money back.

The defendant initially ignored this until 18 August 1993 when, after several demands by the issuing bank for refund, replied that the defendant is unable to accede to such request on grounds: that the issuing bank had approved such payment; the issuing bank had sight of the relevant documents before giving such approval and; substantial time had lapsed before such recourse is made.

In the meantime, there were attempts by the firm, under the advice of the defendant, to rectify the discrepancies but the issuing bank insisted on the refund to their agent, the Reimbursing Bank.

Eventually, the defendant acceded to the request of the issuing bank and refunded a sum of RM194,800 with interest of RM1,726.

Then on 20 August 1993, the defendant by letter of demand requested from the firm the amount refunded and offered the following reason: the documents drawn under the LC is "not in order with ... discrepancies".

This was soon followed by the defendant arbitrarily debiting the firm's current account with RM196,528.

The plaintiff was naturally unhappy over this move. She claims that as a result of the defendant's arbitrary and unlawful action in debiting the firm's account the firm experienced an immediate short fall and could not pay its suppliers. For this, the plaintiff is claiming in its statement of claim:

1. A declaration that the defendant unlawfully debited the said sum from the firm's account and deprived the plaintiff from utilizing such facility.
2. The defendant to return the sum of RM196,528.
3. Interest at the rate charged by the defendant on the sum of RM196,528 debited from the account of the plaintiff with the defendant.
4. Interest of 8% per annum on the sum debited until date of full settlement.
5. General Damages.
6. Special Damages.
7. Cost on solicitor client basis.

Defendant's Defence

According to the statement of defence the following defences are listed:

1. The defendant was only a negotiating bank and not a confirming bank. As a negotiating bank, the defendant has a right of recourse against the plaintiff for the amount credited when discrepancies were subsequently discovered on documents.
2. The defendant is entitled to debit the firm's account based on a deed of General Indemnity signed by the plaintiff in favour of the defendant.

3. As holder in due course of Bills of Exchange (as to how these came about will be explained later) the defendant is entitled to claim and recover from the plaintiff the said sum so credited into the firm's account.

4. Further and in the alternative, there was a mistake in failing to scrutinize and discover the discrepancies resulting in the defendant mistakenly crediting the sum of RM194,605 into the firm's account and it is unfair and unreasonable for the plaintiff to retain such sum.

5. Further and in the alternative, there was no consideration given by the plaintiff in respect of the credited amount.

Analysis

I shall proceed to analyze this case by considering each of the defences raised.

1st Issue: Was The Defendant A Negotiating Bank Or A Confirming Bank, And Does The Defendant Have A Right Of Recourse Against The Plaintiff Under The Process Undertaken In This Transaction?

The use of LC in commercial transaction has long been established. To understand what went wrong in this case, it is necessary to reiterate some basic procedural process normally undertaken by banks, particularly the defendant.

When a foreign buyer pays for purchase by way of LC he usually secures a foreign bank to issue an instrument. Upon receipt of the LC, the seller will then approach a bank to negotiate the LC on his behalf. The negotiating bank will collect the LC from the seller and together with all relevant documents required in the LC forward them to the issuing bank. On sight of these the issuing bank will direct its agent, a reimbursing bank to make payment to the negotiating bank, who in turn will pay the seller when such money is received. Because of this virtually immediate payment upon sight of the relevant documents and the LC by the issuing bank or the reimbursing bank and the receipt of the money by the seller, recourse against each party down the line is required. To ensure this, certain forms are used and accepted by international banking rules and regulations to indicate such rights. One such form is with these words: "UCP 400" printed by the side. When this form is used then recourse is implied. Besides, the negotiating bank would usually require the seller to issue in its favour a 'General Indemnity'. Thus, when discrepancies are subsequently discovered after payment, the negotiating bank can seek reimbursement from the seller.

In this case the defendant has not only used the wrong form but applied some incorrect procedure. It has got its act mixed up with another type of international transaction: the 'collection method'. When it is by way of collection, the defendant becomes a confirming bank. Its role is to collect all

relevant shipping documents, invoices and such likes from the seller for presentation to the foreign bank acting for the buyer. Before such documents are sent off, the customer is requested to complete a form provided for by the confirming bank called the 'Collection Form' and at the edge of this document is printed "ICC Publication No. 322". Upon receipt of these documents, the foreign bank would check through them to ensure that they are in order before approving payment. Only upon receipt of such payment from the foreign bank or its agent (the reimbursing bank) would the confirming bank pays its customer. Since there is this opportunity for the foreign bank to inspect and go through the documents before payment, and the seller is only paid after the confirming bank has received the money, there is no recourse against each party down the line. There is also no necessity for the seller to execute in favour of the confirming bank the General Indemnity. In fact, once ICC Publication No. 322 collection form is used, it is implied, under general banking practice and regulation, that there will be no recourse against anyone.

It must be stressed that 'collection' and 'LC transaction' are two distinctively different transactions. What the defendant did was to combine the two. First, the defendant used the wrong form. The defendant used the collection form with the words "ICC Publication No. 322" printed by the side. Then, in the last section of this form the defendant referred to the LC. This was then sent together with invoice, shipping documents and the LC to the issuing bank. Perhaps the issuing bank may be confused with this approach because when the defendant made a claim on them through its Reimbursing Bank, the Reimbursing Bank had to seek confirmation from the issuing bank for payment. This, by my deduction on how the system works, should not be necessary since in LC transaction the issuing bank should pay upon sight of relevant documents accompanying the LC. In this case, the issuing bank gave the green light to the Reimbursing Bank to pay the defendant. And as disclosed after receiving this, it was credited to account of the firm.

All would be well if the issuing bank did not raise any objection on discrepancies and had the defendant stood firm in rejecting the issuing bank's request for refund. Perhaps the defendant relented upon realizing its own error. It is of no concern to the plaintiff if the defendant chose to refund provided it did not debit the firm's account. But when such sum was debited the plaintiff turned the table on the defendant and not only pointed out the errors committed by the defendant, also alleged the defendant has converted its role from a negotiating bank to a confirming bank, thus denying the defendant's right to recourse.

Faced with such contention, the first question to be answered is: under this kind of situation what sort of transaction did the defendant adopt: was it by way of negotiation or confirming?

My view is that despite the use by the defendant of an incorrect form (UCP 400 form should be used instead of ICC Publication 322) and adoption of certain incorrect procedure in dealing with the issuing bank and the Reimbursing bank, the character of this transaction remained: a negotiating kind. The main reason is: the transaction was a LC transaction from the very beginning. LC was the instrument agreed upon by the seller and the buyer for payment. No one can change that except the parties, and none of them did. When it was a LC transaction then it must be by negotiation. Besides, though the wrong form was used (the collection form) but the words "LC" was specifically mentioned in the last section of this document.

Though this may be a negotiating transaction but did this automatically render a right to the defendant for recourse? Such right to my mind must surely be dependent on terms and conditions between the parties. The use of certain type of form may be accepted in banking practice to indicate recourse, and perhaps between inter banks such right is agreed upon under various inter banking agreements or conventions, but there is no evidence before me that such practice has become an implied term to bind the negotiating bank and its customer. And even if such term is implied by the mere use of a certain kind of form, the defendant in this case has used one that gave them no right of recourse against the plaintiff or the firm. Aside from this, I do not find any evidence (besides the allegation under the deed of General Indemnity of which I shall deal with separately in the latter part of my judgment), which says that the moment the defendant acts as a negotiating bank the defendant is entitled to recourse against the plaintiff for discrepancies in the documentation. In the absence of this I find this defence of the defendant unsustainable.

2nd Issue: Is The Defendant Entitled To Claim From The Plaintiff Under The Deed Of Indemnity?

As revealed, in a LC transaction it is usual for the defendant, as negotiating bank, to secure from the customer a General Indemnity. The logic for this is already explained. Here the defendant is relying heavily on this document to support its action on recourse. But there are circumstances surrounding this document that cast serious doubt on the authenticity that it is meant for this particular transaction.

The first suspicion centres on the date of this document. Next to the printed word "Date" there is a thick layer to blank out obviously what was written. Then just above this blank out area is printed: "12 JUL 1993", and besides this is a small stamp bearing the mark of the defendant.

The 12 July 1993 is of course around the time when the firm approached the defendant to handle this LC transaction for them. But according to the plaintiff, the firm never gave such an indemnity to the defendant for this deal. There was an indemnity given but it was for the earlier inward LC transaction, never for this outward LC undertaking, and that the document given earlier is never intended for general application or extends to this current transaction.

Despite such serious allegation, and the existence of glaring correction over the area where the date is inserted, and when the time for execution of this document is of essence, no material witness was called by the defendant to rebut such accusation or provide explanation over this issue of the authenticity. The only witness called by the defendant was a manager from the Shah Alam Branch with some experience on trade finance, but he was never attached to the Bukit Bintang Branch that handled the transaction. All this witness could assist is to enlighten the court on the general working of trade finance which LC is a component.

Faced with these, I am inclined to believe the version offered by the plaintiff. The blanking out must be a deliberate act by someone to erase from sight something that ought not to be seen. As to who did this, the probability is: the defendant since there is a chop of the defendant annexed right next to it. If this was carried out by the defendant there is no evidence to indicate that the plaintiff consented to such an amendment. Besides, this document was in the possession of the defendant after it was executed and only until the defence was filed that this document surfaced to be used as a defence to the defendant's right to recourse. Before this, at the time when the defendant sent the letter of demand to the plaintiff or the firm for refund there was no mention of this document or such rights contain therein to be utilized for recourse.

When encountered with such facts, the defendant attempted to draw this court's attention to a letter by the firm dated 21 August 1993 where the defendant alleged that the firm has admitted executing such a General Indemnity. I have examined this letter but found it qualified with the following words: "should not be used in this particular instant". By such condition, the plaintiff must have meant – only for the earlier inward LC transaction.

Based on these I find that the General Indemnity is not applicable for recourse against the plaintiff in this particular instance.

3rd Issue: Is The Defendant Entitled To Claim And Recover From The Plaintiff The Said Sum So Credited To The Firm's Account As A Holder In Due Course Of Bills Of Exchange?

In normal circumstances when negotiating a LC it is necessary and the practice for the customer of the negotiating bank to issue in favour of the negotiating bank Bills of Exchange to enable the negotiating bank to arm itself with legal instrument to draw on the issuing bank the sum stated in the LC for the goods sold. In such situation, the seller becomes: the drawer of the Bills of Exchange; the issuing bank: the drawee; and the payee or holder of the Bills of Exchange would be the: negotiating bank. The rational behind this is for the negotiating bank to legally request money on behalf of the seller from the issuing bank and upon receipt of such sum to pay over to the seller.

But here, by claiming as holder of the Bills of Exchange in due course drawn by the plaintiff for this transaction, the defendant argues that it is entitled to be paid such sum stated in the Bills of Exchange before the discovery of the discrepancies. And with this right, action for recourse is justified.

But this approach is fraught by many factors.

First, the drawee in one of these Bills of Exchange is incorrectly inserted as the seller – Mcmillan (another error committed by the defendant since the defendant was responsible for the preparation of these documents for its customer – the plaintiff). It should have been the issuing bank. Even with such error, based on the face value of this bill was this bill ever presented by the defendant to the drawee and if it was "presented, was it accepted and dishonoured by non-acceptance? If such act of presentation was never carried out then "the holder shall lose the right of recourse against the drawer and indorsers" – s. 42 of the Bills of Exchange Act. Here there is no evidence before me to prove presentation of this Bill of Exchange to Mcmillan.

For the next Bill of Exchange that correctly named the Taipei Business Bank (the issuing bank) as the drawee, I find that there was acceptance since there was payment made by the issuing bank (through the Reimbursing bank) to the defendant. When there was acceptance and payment then this bill of exchange must be considered honoured. With this, the effect of this Bill of Exchange came to an end; it has been satisfied. Following from this, the right of any holder in due course of such bill naturally no longer possesses any rights thereunder since the bill itself had been satisfied. It is only when the Bill of Exchange is not accepted or dishonoured by non-payment that the right to claim against the drawee and, of course, against all persons secondarily liable, like the drawer under the instruments takes place – s. 43 of the Bills of Exchange Act 1949 and also see *Halsbury Laws of England*, 4th edn reissue, vol. 4(1)

para. 423. Once a Bill of Exchange is satisfied, any refund thereto would be, in my view, an entirely separate transaction between the holder and the drawee, especially when the drawer did not consent to such arrangement. He, as a person who is secondarily liable should no longer be held responsible under such bill as he has been discharged when the bill was presented and accepted.

Further, I observed that there is no notice given by the defendant to the plaintiff for non-acceptance or dishonoring of this Bill of Exchange. This may be obvious with acceptance of the bill followed by satisfaction in payment by the drawee to the defendant as holder. Without such notice of dishonour or evidence to show exemption from issuance of such notice, then under s. 48 of the Bills of Exchange Act, exempts the drawer from its obligation under the instrument.

4th Issue: Was There A Mistake Of Fact In Failing To Scrutinize And Discover The Discrepancies Resulting In The Defendant Mistakenly Crediting The Sum Of RM194,605 Into The Firm's Account And It Is Unfair And Unreasonable For The Plaintiff To Retain Such Sum

In a negotiating transaction there is no duty for the negotiating bank to scrutinize the accompanying documents against the LC. When such duty does not exist then if the defendant took it upon itself to do so the defendant must bear certain degree of responsibility in not detecting the discrepancies. With this, I cannot comprehend the merits of this defence of mistake in failing to scrutinize and discover the discrepancies.

The LC was given to the defendant together with all the relevant and required documents. There are ticking marks on the completed collection form. Obviously whoever did this must have undertaken the exercise of checking the contents against the documents presented. But who did this? The plaintiff and her witness said that they did not do it. The defendant adduced no witness to testify positively that this was not undertaken by them except its sole witness who said that anyone could have done this, including the issuing bank when the issuing bank was in possession of the documents. But I am inclined to accept the contention that the defendant undertook this act. Firstly there is no direct evidence from the defendant to expressly deny that none of the defendant's staff handling this matter performed such task or that such exercise was never the practice in that Bukit Bintang Branch. Secondly, the defendant's Bukit Bintang Branch which handled this matter was already confused as to how such transaction was to be dealt with. When one examines the process undertaken, the defendant had to a large extent adopted the collection method. With this process checking would be necessary since the collection bank must ascertain the correct documents for presentation to the foreign bank to ensure payment. With such objective, then checking, as indicated by the ticking marks on the collection form must, most probably, be carried out by the defendant. When

the defendant carried out such examination themselves, I do not see how this defence of mistake in failing to detect discrepancies and made payment to the firm can hold water, particularly when such payment was only credited to the firm after receipt of such funds from the Reimbursement Bank who in turn obtained prior approval from issuing bank before making such payment.

5th Issue: Unjust Enrichment

Associated with the above, but though not specifically pleaded, is the claim by the defendant of unjust enrichment out of this entire transaction by the plaintiff. I once again fail to understand this line of reasoning. The plaintiff has not only sold the goods to Mcmillan but has also freighted them to Taiwan. Where, then, is the unjust enrichment by the plaintiff? If the buyer elects to refuse collection then it is not the fault of the firm or the plaintiff. The plaintiff gains nothing from this.

6th Issue: Want Of Consideration

I find no submissions advanced by the defendant on this defence. Perhaps the defendant may have discovered no ground to support it. In any event, from the evidence adduced, I, too, detected no ground to uphold this contention.

Decision

Based on the reasons stated, I find for the plaintiff on all issues raised.

Accordingly, I allow the prayers (a), (b), (c), (d) in the statement of claim.

Regarding the plaintiff's claim for general damages, under prayer (e), since the plaintiffs primary cause of action is for conversion, and the money is now ordered to be returned to the plaintiff I see no reason for acceding to this request of the plaintiff.

On the claim for special damages under prayer (f), no particulars are set out in the statement of claim and neither was there any evidence led on this. Except for testimony of the plaintiff and her witness to say that as a result of the defendant's action in debiting the firm's account leading to the firms' inability to pay its supplier, nothing further is adduced to prove the extent of loss or damage resulting from this act. For this, this court is unable to entertain this request for special damages.

There should, of course, be cost to the plaintiff. But as to why it should be on a solicitor and client basis I cannot see justification on this.

There was a counterclaim by the defendant which was withdrawn during the course of trial. I have already ordered that it be struck off with cost to the plaintiff.